

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOANN TOLLE)	
Claimant)	
VS.)	
)	Docket No. 126,400
PLASTIC FABRICATING, INC.)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the Award dated August 27, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on February 20, 1997.

APPEARANCES

Norman I. Cooley of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found claimant had a 100% permanent partial general disability as the result of a July 28, 1987, back injury. Claimant requested Appeals Board review and contends she is completely and permanently totally incapable of engaging in any

substantial and gainful employment. The only issue before the Appeals Board on this review is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant injured her back on July 28, 1987, when she helped lift a roll of fiberglass onto a table. The parties stipulated that claimant's accident arose out of and in the course of her employment with the respondent. The parties also stipulated that claimant's average weekly wage on the date of accident was \$220.
- (2) Because of the back injury, claimant has undergone four back surgeries. Claimant first underwent a laminectomy in March 1989. When that operation did not alleviate the symptoms, claimant underwent the second and third operations which were attempts to fuse the spine. Claimant's fourth back surgery was performed to remove from claimant's back the various hardware which had been used in the earlier surgeries. Claimant's multiple surgeries have been unsuccessful. Although claimant might benefit from additional surgery, it is not presently recommended.
- (3) Claimant testified her pain is constant and more severe now than before the first surgery. She continues to take prescription medications for her pain. Claimant began receiving social security disability benefits in August 1991. Although the record is not entirely clear, it appears claimant has worked only two days since the July 1987 accident.
- (4) Board-certified orthopedic surgeon Robert A. Rawcliffe, Jr., M.D., examined claimant in October 1995 at the Administrative Law Judge's request. Dr. Rawcliffe found evidence that the July 1987 accident caused lumbar disc herniation. He also found claimant had markedly restricted range of motion caused by severe degenerative disc disease, osteoarthritis, and multiple surgical procedures. In addition, the doctor found that claimant had severe scoliosis (lateral curvature of the spine) and kyphosis (abnormally increased convexity in the curvature of the thoracic spine as viewed from the side and, in this case, reversed 45 degrees). Dr. Rawcliffe found claimant had a 25 percent whole body functional impairment due to her back condition, 10 percent which was due to the preexisting scoliosis and kyphosis.
- (5) As a result of the back injury, according to Dr. Rawcliffe, claimant should now limit herself to sedentary activities; limit occasional lifting to ten pounds maximum; limit more frequent lifting to very light objects; avoid all bending, crouching, twisting, working in awkward positions, kneeling, and crawling; limit standing to no more than two hours at a time; limit sitting to no more than one hour at a time without getting up and moving around; limit walking to short distances, and limit stair climbing to once or twice per day. Claimant is not able to bend or lean forward while sitting and should not lift items off the floor.

(6) Considering claimant's limited education (11th grade), her limited transferrable work skills, her ongoing debilitating symptoms, the findings and opinions of Dr. Rawcliffe, and the opinions of vocational consultant Donald E. Vander Vegt who indicated claimant was unemployable for all practical purposes, the Appeals Board finds claimant has lost the ability to perform substantial and gainful employment in the open labor market as a result of the July 1987 accident.

CONCLUSIONS OF LAW

Because of the July 28, 1987, date of accident, claimant's right to permanent disability benefits is governed either by K.S.A. 1987 Supp. 44-510c (for permanent total disability) or K.S.A. 1987 Supp. 44-510e (for permanent partial general disability). K.S.A. 1987 Supp. 44-510c(a)(2) provides in pertinent part as follows:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

Additionally, evidence that a worker is essentially and realistically unemployable due to the effects of a work-related injury may support a finding of permanent total disability. See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

As indicated in the above findings, the Appeals Board has found that claimant is now unable to engage in any substantial and gainful employment. As claimant testified, her activities are significantly limited as her pain now exceeds that which she experienced before her four unsuccessful surgeries. As Mr. Vander Vegt indicated, he found claimant unemployable for all practical purposes as it is unrealistic to believe an employer would accommodate claimant's severe restrictions. The Appeals Board is not persuaded by the testimony from respondent's vocational expert Karen C. Terrill that claimant retains the ability to perform work in the open labor market. When considering the entire record, claimant is permanently and totally disabled and, therefore, entitled to weekly permanent total disability benefits subject to the \$125,000 statutory maximum.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 27, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joann Tolle, and against the respondent, Plastic Fabricating, Inc., and its insurance carrier, National Union Fire Insurance Co., for an accidental injury which occurred July 28, 1987, and based upon an average weekly wage of \$220 for 415 weeks of temporary total disability compensation at the rate of \$146.67 per week or \$60,868.05, followed by 437.25 weeks of permanent total disability benefits at the rate of \$146.67 per week or \$64,131.95, making a total award of \$125,000.

As of February 10, 1998, there is due and owing claimant 415 weeks of temporary total disability compensation at the rate of \$146.67 per week or \$60,868.05, followed by 135 weeks of permanent total disability compensation at the rate of \$146.67 per week in the sum of \$19,800.45 for a total of \$80,668.50 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$44,331.50 is to be paid for 302.25 weeks at the rate of \$146.67 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent that they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman I. Cooley, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director